

8th Circuit Finds Copyright Act Preempts State Right Of Publicity Of Professional Athletes

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In a recent case, *Dryer v. Nat'l Football League, No. 14-3428, 2016 WL 761178 (8th Cir. Feb. 26, 2016)*, former National Football League ("NFL") players (the "Players") sued the NFL over the use of their name, image, voice, and likeness in films and promotional videos released by NFL Films. The Players did not dispute the NFL's right to record their performance in live sporting events, or the NFL's valid copyright in the footage. Rather, the Players challenged the NFL's right to further use this footage by incorporating it into other films and promotional videos.

The question before the Court was whether or not the district court erred in finding that the Copyright Act preempts the Players right-of-publicity claims. The Court applied a two part test to determine whether federal copyright law preempts causes of action under state right-of-publicity claims: (1) is the work (the films released by NFL Films) copyrightable subject matter as defined by §102 and §103 of the Copyright Act, and (2) is the right created under state law equivalent to any of the rights within the scope of copyright as defined by §106 of the Copyright Act.

Fixed recordings of live performances, including sporting events, are within the scope of copyrightable material. Therefore, the Players right-of-publicity claims challenge a copyrightable work and the first part of the test is met. With respect to the second part of the test, the Court considered the policy behind the copyright law, namely to "suppl[y] the economic incentive to create and disseminate ideas." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539,558 (1985). In contrast, the policy behind the state right-of-publicity causes of action is to provide incentives to "encourage a person's productive activities and to protect consumers from misleading advertising." *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007). The Court found that the purposes behind the state's interest in protecting consumers are unrelated to the purposes behind the copyright law.

The Players further argued that the works produced by NFL films were commercial speech that the state has a legitimate interest in regulating and therefore are outside the scope of copyright law. In evaluating the Players' arguments, the Court applied a three part test: (1) is the work an advertisement, (2) does the work relate to a specific product or service, and (3) does the NFL have an economic motivation. The Court agreed with the district court and held that the works do not propose a commercial transaction and are therefore not advertisements and that the works do not refer to the NFL as a specific product or service. The Court further held that the works "represent speech of independent value and public interest rather than advertisements for a specific product, the NFL's economic motivations alone cannot convert these productions into commercial speech." Therefore, the Court determined that the Copyright Act preempts the player's right-of-publicity claims under state law

The full opinion can be found here: <http://media.ca8.uscourts.gov/opndir/16/02/143428P.pdf>

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